

Entered on Docket

October 18, 2022

EDWARD J. EMMONS, CLERK

U.S. BANKRUPTCY COURT

NORTHERN DISTRICT OF CALIFORNIA



1 Signed and Filed: October 18, 2022  
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*Dennis Montali*

5 DENNIS MONTALI  
6 U.S. Bankruptcy Judge  
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10 UNITED STATES BANKRUPTCY COURT  
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13 NORTHERN DISTRICT OF CALIFORNIA  
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16 In re ) Bankruptcy Case  
17 THEOS FEDRO HOLDINGS, LLC, ) No. 21-30202-DM  
18 )  
19 Debtor. )  
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29 PHILIP ACHILLES, individually ) Adversary Case No. 21-03023-DM  
30 and in his capacity as trustee )  
31 of the Achilles Revocable Trust )  
32 dated May 27, 2003, and THEOS )  
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34 California LLC, )  
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1 v. )  
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3 PHILIP ACHILLES, individually )  
4 and in his capacity as trustee )  
5 of the Achilles Revocable Trust )  
6 dated May 27, 2003, and THEOS )  
7 FEDRO HOLDINGS, LLC, a )  
8 California LLC, )  
9 )  
10 Counter-Claim Defendants. )  
11 )  
12 PENDER CAPITAL ASSET BASED )  
13 LENDING FUND I, LP, )  
14 )  
15 Cross-Claimant, )  
16 )  
17 v. )  
18 )  
19 JOHN A. WISE & ASSOCIATES, PLLC, )  
20 and AMY P. FRYAR, )  
21 )  
22 Cross-Claim Defendants. )  
23 )  
24 )

16 **MEMORANDUM DECISION ON MOTION TO DISMISS THIRD AMENDED COMPLAINT**  
17 **WITHOUT LEAVE TO AMEND**

18 On July 13, 2022, the court entered its *Tentative Ruling on*  
19 *Alternative Motion to Dismiss* ("Tentative Ruling") (Dkt. 58).  
20 On July 14, 2022, upon the parties' acceptance of the Tentative  
21 Ruling, the court entered an *Order Granting Alternative Motion*  
22 *to Dismiss* (Dkt. 59) dismissing chapter 11 trustee Janina  
23 Hoskins' ("Trustee") Second Amended Complaint with leave to  
24 amend.

25 On August 10, 2022, the Trustee filed a Third Amended  
26 Complaint (Dkt. 63). On August 24, 2022, Defendant Pender  
27 Capital Asset Based Lending Fund I, LP ("Pender") filed a *Motion*  
28 *to Dismiss Third Amended Complaint* ("Motion to Dismiss") (Dkt.

1 64). At the conclusion of a hearing on the Motion to Dismiss on  
2 September 23, 2022, the court took the matter under submission.

3 Upon due consideration and for the reasons discussed below,  
4 the court will grant the Motion to Dismiss without leave to  
5 amend.

6 **I. STANDARD FOR DISMISSAL**

7 A motion to dismiss pursuant to Federal Rule of Civil  
8 Procedure 12(b) (6) (made applicable by Federal Rule of  
9 Bankruptcy Procedure 7012) is a challenge to the sufficiency of  
10 the allegations set forth in the complaint. To overcome a Rule  
11 12(b) (6) motion to dismiss, a plaintiff must plead "enough facts  
12 to state a claim to relief that is plausible on its face." *Bell*  
13 *Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007). "A claim  
14 has facial plausibility when the plaintiff pleads factual  
15 content that allows the court to draw the reasonable inference  
16 that the defendant is liable for the misconduct alleged."  
17 *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). "The plausibility  
18 standard is not akin to a probability requirement, but it asks  
19 for more than a sheer possibility that a defendant has acted  
20 unlawfully." *Id.* (internal quotation marks omitted). A pleading  
21 that "tenders naked assertions devoid of further factual  
22 enhancement" does not meet this standard. *Id.* (internal  
23 quotation marks omitted). In considering a Rule 12(b) (6)  
24 motion, this court must "accept factual allegations in the  
25 complaint as true and construe the pleadings in the light most  
26 favorable to the nonmoving party." *Manzarek v. St. Paul Fire &*  
27 *Marine Ins. Co.*, 519 F.3d 1025, 1031 (9th Cir. 2008).

1       **II. DISCUSSION**

2       The court's Tentative Ruling made clear that any amended  
3       complaint must allege that the Debtor was not in breach of  
4       contract, or excused from performance, at the time that the  
5       Trustee alleges that Pender blocked the transfer of the \$515,000  
6       holdback or did anything else that might support a breach of  
7       contract or "good faith and fair dealing" theory of relief. The  
8       Tentative Ruling also stated that an amended complaint must  
9       allege more facts as to the other claims against Pender.

10      **A. Trustee's First Claim: Breach of Contract Against Pender**

11      All claims against Pender stem from the rights and  
12     obligations set forth in the underlying Deed of Trust,  
13     Promissory Note, and Business Agreement<sup>1</sup> (the "Loan Documents").  
14     Accordingly, the court incorporates by reference and considers  
15     the Loan Documents in the context of the Motion to Dismiss. See,  
16     e.g., *U.S. v. Ritchie*, 342 F.3d 903, 908 (9th Cir. 2003) (noting  
17     that courts may "consider certain materials – documents attached  
18     to the complaint, documents incorporated by reference in the  
19     complaint, or matters of judicial notice – without converting  
20     the motion to dismiss into a motion for summary judgment"). The  
21     Loan Documents make clear that no disbursements needed to be  
22     made, given the existence of a default by the borrower.

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25     <sup>1</sup> Though the Trustee only references the Deed of Trust and  
26     Promissory Note, Pender contends, and the court agrees, that the  
27     Business Agreement along with the Deed of Trust and Promissory  
28     Note were part of a single loan transaction and thus must be  
   construed together as one contract. Cal. Civ. Code § 1642;  
   *Holguin v. Dish Network LLC*, 229 Cal.App.4th 1310, 1320 (Cal.  
   Ct. App. 2014).

1       According to the Trustee, Pender breached the contract when  
2 Pender or its agent refused to release the holdback funds to the  
3 Debtor. However, the Third Amended Complaint does not address  
4 that Debtor was in default from the outset of the making of the  
5 loan under the terms of the Loan Documents. Because the Third  
6 Amended Complaint does not address the reality of Debtor's  
7 default, the Trustee did not respond to the court's request  
8 regarding Debtor's own performance or excuse from performance  
9 under the Loan Documents.

10       The Trustee alternately asserts that Pender's First Amended  
11 Crossclaim ("Crossclaim") (Dkt. 62) against Defendant John Wise  
12 & Associates, PLLC (Wise), is a conclusive admission that Wise,  
13 and thereby Pender, breached the contract reflected in the Loan  
14 Documents. As the court explained at the hearing, the court  
15 cannot and will not infer liability from Pender's filing of the  
16 Crossclaim, which serves ultimately as a demand for  
17 indemnification if Pender is ultimately held liable for some or  
18 all the Trustee's claims. To infer liability from the  
19 Crossclaim would be to short-circuit the court's duty to  
20 determine whether Pender's own conduct was wrongful. Stated  
21 otherwise, an assertion by Pender of a breach of another  
22 contract by Wise does not amount to an admission of its own  
23 breach, whether by judicial estoppel or otherwise.

24       The Trustee also does not address that the holdback was for  
25 discrete amounts that were to be disbursed only upon the  
26 happening of certain events. The Third Amended Complaint does  
27 not allege that the conditions precedent to release of the funds  
28

1 had been met independent of Debtor's default, only that the  
2 funds were not disbursed and therefore Pender was in breach.

3 **B. Trustee's Second Claim and Ninth Claims: Breach of the**  
4 **Covenant of Good Faith and Fair Dealing and Violation of**  
5 **Business and Professions Code Section 17200 Et Seq. Against**  
6 **Pender.**

7 As to the claim that Pender breached the implied covenant  
8 of good faith and fair dealing, the Trustee alleges a variety of  
9 acts by Pender, including a scheme to have Debtor unknowingly  
10 enter a "loan to own" debt that Debtor would inevitably default  
11 upon, and conspiring with Wise to steer Debtor into a doomed  
12 deal. These are bare assertions, with no further facts from the  
13 Third Amended Complaint or the incorporated contracts that could  
14 give rise to an inference of the deal being any type of "loan to  
15 own" scheme. Even if more facts were incorporated, the Trustee  
16 does not elaborate how a "loan to own" scheme, while perhaps  
17 felt to be distasteful, is on its own contrary to any state or  
18 federal laws or otherwise would give rise to a claim for relief.

19 As Pender notes, "[i]n order to state a claim for breach of  
20 an implied covenant of good faith and fair dealing, the specific  
21 contractual obligation from which the implied covenant of good  
22 faith and fair dealing arose must be alleged." *Griffin v. Green*  
23 *Tree Servicing, LLC* (C.D. Cal. 2015) (internal quotations and  
24 citations omitted). Here, Trustee alleges no specific  
25 contractual obligation from which the implied covenant and fair  
26 dealing arose, and instead alleges a general motive of  
27 wrongdoing in originating the loan at all, under the conclusory  
28 "loan to own" label. This label, without facts regarding the

1 spirit of any specific provision of the Loan Documents or other  
2 contract that may have been violated, is not sufficient to  
3 successfully plead this claim. This is all the more so in light  
4 of the extensive contractual provisions that protected Pender in  
5 the event of a breach by Debtor.

6 Trustee claims that Pender has breached Business and  
7 Professions Code 17200 et seq (codifying claims of unlawful and  
8 unfair business practices) by virtue of Pender's breach of  
9 contract and breach of the covenant of good faith and fair  
10 dealing. Because the court has determined that insufficient  
11 facts regarding either claim have been plead, so too is this  
12 claim insufficient.

13 **C. Trustee's Third, Eighth, and Tenth Claims: Negligence,  
14 and Aiding and Abetting Breach of Fiduciary Duty, and Conspiracy  
15 Against Pender.**

16 The court stated in its Tentative Ruling that the Trustee  
17 needed to "bolster her allegations of her aiding and abetting,  
18 negligence and conspiracy claims," meaning the court expected  
19 that in any amended complaint, the claims, if plead again,  
20 should contain enough facts for the court to infer that Pender  
21 is liable for those claims. Upon review of the Third Amended  
22 Complaint, the court concludes that the Trustee has not and  
23 cannot plead sufficient facts necessary to make any facially  
24 plausible claim of negligence, aiding and abetting, or  
25 conspiracy. Though the Trustee claims that the making of the  
26 contract itself established a duty of care owed to Debtor by  
27 Pender, as Pender correctly counters, "under California law, a  
28 financial institution owes no duty of care to a borrower when

1 the institution's involvement in the loan transaction does not  
2 exceed the scope of its conventional role as a mere lender of  
3 money." *Rockridge Trust v. Wells Fargo, N.A.*, 98 F. Supp. 2d  
4 1110, 1160 (N.D. Cal. 2013) (internal quotations omitted).

5 Similarly, the court cannot infer from the facts that  
6 Pender aided and abetted Wise's alleged breach of fiduciary duty  
7 to Debtor or engaged in a conspiracy with Wise to place Debtor  
8 into default. Trustee does not dispute that the plain text of  
9 the Loan Documents incorporated a holdback of certain funds  
10 subject certain conditions precedent being met. As noted above,  
11 Trustee does not claim those conditions were met. Nor does  
12 Trustee allege facts as to how Pender either prevented Wise from  
13 disbursing funds, or conspired with Wise to ensure the funds  
14 were not disbursed. At the hearing, it appears the thrust of  
15 the Trustee's arguments regarding either aiding and abetting or  
16 conspiracy is that the contractually held-back funds were not  
17 disbursed but Pender continued to charge Debtor interest.  
18 However, the Trustee does not allege that this interest was  
19 somehow contrary to the Loan Documents (they were not) and does  
20 not connect this charging of interest to a breach of Wise's  
21 duties or to a broader conspiracy to cause Debtor to default.

22 **D. Leave to File a Fourth Amended Complaint is Futile**

23 The Trustee, in her Opposition to the Motion to Dismiss  
24 ("Opposition") (Dkt. 67) and at the hearing, proposes a Fourth  
25 Amended Complaint. While the court acknowledges that the Third  
26 Amended Complaint represents the Trustee's second complaint in  
27 this adversary proceeding, it would be both unfair and futile to  
28 force Pender to defend itself for a fifth time, in an adversary

proceeding that has not moved past the initial pleading stage after more than a year.

Leave to amend a complaint may be denied where the amendment sought "(1) prejudices the opposing party; (2) is sought in bad faith, (3) produces an undue delay in litigation; or (4) is futile." *AmerisourceBergen Corp. v. Dialyst West, Inc.*, 465 F.3d 946, 951 (9th Cir. 2006). An amendment is futile "where previous attempts have failed to cure a deficiency and it is clear that the proposed amendment does not correct the defect." *Serpa v. SBC Telecomm., Inc.*, 318 F.Supp.2d 865, 872 (N.D. Cal. 2004) (citations omitted).

The Trustee's recent attempt failed to set forth the specific facts the court determined would be necessary for a successful amended complaint. The Trustee's proposed amendments set forth in the Opposition and at the hearing still do not contemplate addressing the Debtor's initial default under the Loan Documents. The Trustee did not assert these facts even with specific prompting from the court, and the Trustee still has not proposed asserting these facts in an amended complaint. Accordingly, the court must conclude that the Trustee lacks ability to set forth a complaint that corrects the defects addressed here.

### III. CONCLUSION

For the reasons set forth above, the Motion to Dismiss will GRANTED without leave to amend. A separate order consistent with this Memorandum Decision is being issued this date.

\*\*END OF MEMRANDUM DECISION\*\*

COURT SERVICE LIST

Marc L. Libarle  
Law Offices of Marc L. Libarle  
1388 Sutter Street  
Suite 910  
San Francisco, CA 94109

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